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JAMES H. McKENNEY,
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No. 340.

Br. of Atty. Gen. [illegible]
for Appellees.

Filed Oct. 20, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE CHEROKEE NATION ET AL., APPELLANTS,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR. } No. 340.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE CHEROKEE NATION AND THOMAS M. Buffington, Joseph M. La Hay, John R. McIntosh, Henry C. Meigs, who sue as well for themselves as for all other citizens of the Cherokee Nation of Indians residing in the Indian Territory, appellants,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR. } No. 340.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

STATEMENT AND INTRODUCTION.

This suit was brought in the supreme court of the District of Columbia to restrain the Secretary of the Interior from leasing any lands of the Cherokee Nation for mining purposes. It is alleged in the bill of complaint that the Cherokee Nation is a body politic, recognized as such by the United States from the foundation of the Government; that complainant Buffington is the principal chief of said nation; that

complainant La Hay is the treasurer thereof, and that the other complainants are citizens of said nation. It is further alleged that by certain treaties, specifically named, between the United States and the Cherokee Nation and a certain patent issued thereunder, the said Cherokee Nation became the owner in fee of the lands described therein without any right of reversion, unless the nation should become extinct or abandon said lands. It is further alleged that numerous applications have been made to the respondent, as Secretary of the Interior, by persons not citizens of the Cherokee Nation, for leases upon lands belonging to said nation, for the purpose of mining oil, gas, coal, and other minerals, among which applications is one by a corporation known as the Cherokee Oil and Gas Company, claiming to be organized under the laws of the State of Arkansas, for a lease upon about 94,000 acres of land now occupied by citizens of the nation, under the laws and customs of the nation, and used by them for agricultural and grazing purposes. It is alleged, on information and belief, that the respondent, as Secretary of the Interior, is giving favorable consideration to said application and is about to grant it to the extent of 18 sections of land for the purpose of mining oil for a period of fifteen years, thereby threatening to deprive the members of the Cherokee Nation of their right to the exclusive use of said lands, in utter disregard of the provisions of said treaties and patents and the rights of the Cherokee Nation and its members thereunder, and that unless restrained the respondent

will cause irreparable injury, wrong, and oppression to, and deprivation of, the property rights of complainants and all other members of said Cherokee Nation. (Record, pp. 1–13).

To said bill of complaint respondent interposed a demurrer upon the grounds (Record, p. 14):

> 1. Said bill is bad in substance and for want of equity, and does not state facts sufficient to entitle complainants to the relief prayed for or to any relief.
>
> 2. The court has no jurisdiction over the subject-matter of the suit.
>
> 3. There is a defect of parties defendant.

Accompanying said demurrer was a more specific statement, as follows (Record, p. 14):

> Defendants will urge as reasons for demurrer:
>
> 1. That the matters named in the bill are matters of administration, which can not be taken away from an Executive Department and carried into the courts.
>
> 2. That the Cherokee Oil and Gas Company named in the bill is a necessary party to the suit, as shown by the bill.
>
> 3. That the defendant is proceeding in conformity with the act of Congress approved June 28, 1898 (30 Stat., 495), which is a valid exercise of the power of Congress over the property of an Indian tribe.

The court sustained the demurrer and entered a decree dismissing the bill of complaint (Record, p. 15). The opinion of Mr. Justice Hagner is printed in the record (pp. 16–21). Upon appeal to the court of

appeals of the District of Columbia the decree of the supreme court dismissing the bill was affirmed (Record, p. 23).

From that decree of affirmance the complainants have appealed to this court.

For a satisfactory presentation and clear understanding of the questions involved, it is advisable to refer briefly to Congressional action affecting the Cherokee Nation of a date later than the treaties mentioned in the bill of complaint. These are all public acts of which the courts will take judicial notice.

In addition to the treaties between the United States and the Cherokee Nation, mentioned in the bill of complaint (May 6, 1828, 7 Stat., 311; February 14, 1833, 7 Stat., 414; December 29, 1835, 7 Stat., 478; August 6, 1846, 9 Stat., 871), there was another of July 19, 1866 (14 Stat., 799), which is referred to here only to complete the history of the dealings with the tribe.

Soon after the date of this latter treaty the policy of dealing with the Indian tribes was abandoned and in the act of March 3, 1871 (16 Stat., 544, 566), it was declared:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

This provision was carried into the Revised Statutes of the United States as section 2079.

By a provision in the act of March 3, 1893 (27 Stat., 612, 645), the President was authorized to appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation, and the Seminole Nation to procure the extinguishment of the tribal title to any lands in Indian Territory held by any of such nations, either by cession of the same to the United States or by division thereof in severalty among the members of said nations or tribes, respectively, with a view to the ultimate creation of a State or States of the Union to embrace the lands within said Indian Territory. The commission was appointed and entered upon the duties prescribed, and by act of March 2, 1895 (28 Stat., 910, 939), the membership thereof was increased to five.

This Commission, officially designated as the "Commission to the Five Civilized Tribes," but popularly known as the "Dawes Commission," made reports on November 20, 1894, and November 18, 1895, of the condition of affairs in Indian Territory, which reports are referred to and quoted from by this court in the statement of the case in *Stephens* v. *Cherokee Nation* (174 U. S., 445, 451–453). The court there (pp. 447–451) also referred to and quoted from a report of the Senate Committee on the Five Civilized Tribes of May 7, 1894. These various reports are quite pertinent here as showing the inducement for and purpose of subsequent legislation.

By a provision in the act of June 10, 1896 (29 Stat., 321, 339), said Commission was directed to continue the exercise of the authority already conferred upon it, and was invested with further powers in respect of hearing and determining applications for citizenship in said tribes and making rolls of the members thereof.

A provision in the act of June 7, 1897 (30 Stat., 62, 84), directed said commission to continue to exercise all authority theretofore conferred upon it to negotiate with said Five Tribes, and gave further direction respecting the making of rolls of citizenship.

The act of June 28, 1898 (30 Stat., 495), entitled "An act for the protection of the people of the Indian Territory, and for other purposes," contains provisions for the completion of the rolls of citizenship of said tribes, for the reservation of town sites and the sale of lots therein, and for the allotment of the exclusive use and occupancy of the surface of all lands susceptible of allotment among the citizens of the respective tribes with a provision as follows (sec. 11):

> But all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits.

Section 13 of said act contains provisions for leasing the oil, coal, asphalt, and mineral deposits as follows:

> That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals

in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void. No lease shall be made or renewed for a longer period than fifteen years, nor cover the mineral in more than six hundred and forty acres of land, which shall conform as nearly as possible to the surveys. Lessees shall pay on each oil, coal, asphalt, or other mineral claim at the rate of one hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years, and five hundred dollars, in advance, for each succeeding year thereafter, as advanced royalty on the mine or claim on which they are made. All such payments shall be a credit on royalty when each said mine is developed and operated and its production is in excess of such guaranteed annual advanced payments; and all lessees must pay said annual advanced payments on each claim, whether developed or undeveloped; and should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance shall then become and be the money and property of the tribe. Where any oil, coal, asphalt, or other mineral is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other land and improvements, shall be

ascertained under the direction of the Secretary of the Interior and paid to the allottee or owner of the land by the lessee or party operating the same, before operations begin: *Provided*, That nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt, or mineral which have been assented to by act of Congress, but all such interest shall continue unimpaired hereby, and shall be assured to such holders or owners by leases from the Secretary of the Interior for the term not exceeding fifteen years, but subject to payment of advance royalties as herein provided, when such leases are not operated, to the rate of royalty on coal mined, and the rules and regulations to be prescribed by the Secretary of the Interior, and preference shall be given to such parties in renewals of such leases: *And provided further*, That when, under the customs and laws heretofore existing and prevailing in the Indian Territory, leases have been made of different groups or parcels of oil, coal, asphalt, or other mineral deposits, and possession has been taken thereunder and improvements made for the development of such oil, coal, asphalt, or other mineral deposits by lessees or their assigns, which have resulted in the production of oil, coal, asphalt, or other mineral in commercial quantities by such lessees or their assigns, then such parties in possession shall be given preference in the making of new leases, in compliance with the directions of the Secretary of the Interior; and in making new leases due consideration shall be made for the improve-

> ments of such lessees; and in all cases of the leasing or renewal of leases of oil, coal, asphalt, and other mineral deposits preference shall be given to parties in possession who have made improvements. The rate of royalty to be paid by all lessees shall be fixed by the Secretary of the Interior.

Section 16 contains a provision as to the payment and distribution of rents and royalties due said tribes, as follows:

> That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for anyone to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong.
> * * *

It is not alleged that the granting of the application referred to and the giving of a lease in accordance therewith are prohibited by said act of June 28, 1898, nor that the respondent proposes to disregard any provision of that law or to take any action otherwise than

in strict conformity therewith. Under these circumstances the citation of that act, showing on its face, as it does, full and complete authority for the alleged proposed action, is perhaps sufficient to sustain the contention that the complainants are not entitled to the relief prayed for or to any relief. Relief could be given only upon the theory that Congress had no power to enact such legislation. The courts are ever reluctant to enter upon an inquiry that involves that question. One who asks a judgment declaring an act of Congress unconstitutional should do it by direct allegation, setting forth specifically and fully the grounds therefor, and not indirectly and by implication only, as is done in the present proceeding.

Inasmuch, however, as the relief prayed for can be given only by finding said act to be void because of conflict with some provision of the Constitution, it is deemed proper to discuss the general powers and duties of Congress in respect of the subject-matter.

THE INDIANS ARE WARDS OF THE UNITED STATES.

The Indian tribes located within the geographical limits of the United States are not recognized as independent sovereign powers or nations, but as dependent communities, subject in all matters relating to their protection, government, civilization, and support to the supervision and control of the United States. In *Cherokee Nation* v. *Georgia* (5 Peters, 1, 17) the status of these same people—the Cherokee Nation—was considered, and Chief Justice Marshall, after concluding that the Indian tribes can not be accurately denomi-

nated as foreign nations, describes their relation to the United States as follows:

> They may, more correctly, perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.

The relation the Indians bear to the United States is more fully and definitely stated in *United States* v. *Kagama* (118 U. S., 375, 383), where it is said:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* upon the United States. Dependent largely for their daily food. Dependent for their political rights.
>
> * * * * *
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that Government because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The rule thus announced has never been modified or questioned by this court, but has been repeated in later decisions, among which may be mentioned *Choctaw Nation* v. *United States* (119 U. S., 1, 22); *Cherokee*

Nation v. *Southern Kansas Ry. Co.* (135 U. S., 641, 653); *Stephens* v. *Cherokee Nation* (174 U. S., 445, 484).

For many years the political branch of the Government accorded to various Indian tribes a certain degree of recognition as independent people, in that treaties were negotiated with them and they were allowed to make laws and regulations in respect of their internal and tribal affairs. This policy was finally abandoned, and that which should thereafter be pursued was declared by the act of March 3, 1871, supra. The authority of Congress to make this change and to control and regulate the affairs of the Indian tribes by direct legislation, has never been seriously questioned and has been recognized by this court in many decisions.

In *United States* v. *Kagama* (*supra*), the court, after referring to cases defining the status of Indian tribes, said (p. 382):

> In the opinions in these cases they are spoken of as "wards of the nation," "pupils," as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes.

In *Choctaw Nation* v. *United States* (119 U. S., 1, 27), after describing the United States as a sovereign nation subject to no law but the law of nations, it was said:

> On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.

In *Cherokee Nation* v. *Southern Kansas Ry. Co.* (135 U. S., 641, 654), the court quoted the excerpt given above from *Choctaw Nation* v. *United States* as the latest utterance upon the general subject of the status of the Indian tribes. In this case, after referring to the treaties with the Cherokee Nation of 1835, 1846, and 1866, as recognizing the Cherokees as a separate and distinct people, and as guaranteeing to them the title and possession of their lands and jurisdiction over their country, it was said:

> But neither these nor any previous treaties evinced any intention upon the part of the Government to discharge them from their condition of pupilage or dependency and constitute them a separate, independent, sovereign people, with no superior within its limits.

The case which is, however, the most pertinent to the present inquiry, because it involved not only the status of the Cherokees, the people complaining here, but

also the validity of the act of June 28, 1898, the execution of which it is sought in this proceeding to prevent, is *Stephens* v. *Cherokee Nation* (174 U. S., 445). That case involved the validity of the act of June 28, 1898, and preceding legislation by which the United States had assumed practically full control over the Cherokee Nation and the others of the Five Civilized Tribes, even to the extent of determining the membership thereof. It was there said (p. 483):

> It is true that the Indian tribes were for many years allowed by the United States to make all laws and regulations for the government and protection of their persons and property, not inconsistent with the Constitution and laws of the United States; and numerous treaties were made by the United States with those tribes as distinct political societies. The policy of the Government, however, in dealing with the Indian nations was definitely expressed in a proviso inserted in the Indian appropriation act of March 3, 1871, c. 120, 16 Stat., 544, 566, to the effect:

After quoting from the act of March 3, 1871, and section 2079, Revised Statutes, and after an extended extract from the decision in *Cherokee Nation* v. *Southern Kansas Ry. Co.* (135 U. S., 641, 653), as sufficiently showing the general power of Congress over the Indian tribes, it was said (p. 486):

> Such being the position occupied by these tribes (and it has often been availed of to their advantage), and the power of Congress in the premises having the plentitude thus indicated,

> we are unable to perceive that the legislation in question is in contravention of the Constitution.

As if to emphasize the assertion as to the plenary power of Congress and to avoid the possibility of any mistake as to the court's position, it was said in another place (p. 488):

> We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we can not say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of the acts in respect of the determination of citizenship can not be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.

After pointing out that the principal object intended to be secured by allowing an appeal to this court in the case there involved was the testing of the constitutionality of the act of June 28, 1898, and after giving a résumé of its provisions and characterizing them as comprehensive and sweeping in character, it was said:

> For the reasons already given we regard this act in general as not obnoxious to constitutional objection.

It is insisted by appellants that the court in that case had under consideration only that portion of said act of June 28, 1898, referring to citizenship in said nation, and that any statements made as to the general character of the act should not be taken as affirming the constitutionality of the provisions thereof relating to the leasing of mineral deposits. It is not believed that this contention is well made, but even if it be correct the same process of reasoning which led to the conclusion announced as to validity of the provisions of the act directly involved there, would lead to the same conclusion in respect of the provisions directly involved here. If Congress had the power to provide a method for determining applications for membership in said tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe, it certainly had authority to take measures to make that property productive and to secure therefrom an income for the benefit of the tribe.

In the brief on behalf of the Indian appellants in the case of *Lone Wolf et al.* v. *Hitchcock et al.*, filed as a

part of appellants' brief herein, the purpose of Congress to protect the Indians by this act of 1898 is recognized; the necessity for some such action, and the power of Congress to take it seem to be conceded. Speaking of said act in connection with the provisions thereof as to allotments, it is said (p. 73): "The act was an effort on the part of Congress to prevent the monopoly of the land by a few persons and to equalize the landholdings, so as to give every citizen an equal share in the use of the lands of the tribe." With equal propriety it may be said with reference to the provisions in respect of mineral leases: "The act was an effort on the part of Congress to prevent the monopoly of the mineral deposits in the land by a few persons, so as to give every citizen an equal share in the revenues to be derived therefrom."

LEGISLATIVE CONTROL OF THE PROPERTY OF WARDS.

It must be remembered that the land from which mineral may be taken under any lease made under the provision of said act of June 28, 1898, is tribal property, in which no member of the tribe has any individual ownership, and that the mineral to be extracted under any such lease is tribal property.

Further, this case involves no question as to the *taking* of property, but only one relating to the control and development in the direction of increased productiveness of the property of the tribe, a ward of the United States. This tribe or nation of Indian wards is within one of the Territories of the United States over which Congress has exclusive sovereignty, and sole and

full power of legislation. In *National Bank* v. *County of Yankton* (101 U. S., 129, 133) this court, after saying that "it is certainly now too late to doubt the power of Congress to govern the Territories," described the relationship of such Territories to the United States and the power of Congress over them and the people residing in them as follows:

> * * * The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.
>
> In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the Territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid and a valid act void. In other

> words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.

This principle has become a well-settled rule, as shown by the many decisions where it has been asserted, among which are: *Murphy* v. *Ramsey* (114 U. S., 15, 44): *Mormon Church* v. *United States* (136 U. S., 1, 43–44): *Utter* v. *Franklin* (172 U. S., 416, 420): *De Lima* v. *Bidwell* (182 U. S., 1, 196), and *Downes* v. *Bidwell* (182 U. S., 244, 267–269).

Looking at the question presented here in the light of the rule thus announced, it will be found that the authority of Congress to enact legislation for the management of the property of these wards of the nation is fully sustained. The management and care of the property of minors, incompetents, and other persons not *sui juris* is one of the subjects which the legislature, within whose jurisdiction such persons reside, may or may not submit to the courts, as it may deem proper. (Cooley's Constitutional Limitations, sixth edition, page 115 *et seq.*)

Legislative control and management of the estates of minors is fully discussed by this court in *Hoyt* v. *Sprague* (103 U. S., 613). The legislature of Rhode Island authorized the investment of the property of certain minors in the shares of a business corporation which afterwards failed, whereby the property of the minors was lost. After attaining their majority they

sought to recover their original property upon the theory that the authorization of the investment was a judicial function, outside the scope of legislative authority. This court held (syllabus) "that in the absence of constitutional restraint the legislature may pass special laws for the sale or investment of the estates of infants or other persons who are not *sui juris*," and in the course of the opinion said (pp. 633, 634):

> * * * As already intimated, it can not be doubted that the legislative power extends to the regulation of the investments and the management of minors' estates by their guardians. The legislature certainly might, if it saw fit, pass a general law authorizing a guardian to invest the property of his ward in the capital stock of a corporation engaged in manufacturing, trading, or financial operations, or in a particular class of operations, as banking, insurance, or any other that might be specified. Usually, such authority, if given, would be required to be exercised under the allowance and supervision of a court; but that would be a matter of legislative discretion. That such an authority could be conferred by law there can be no doubt. Analogous powers have been conferred from time immemorial.
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> * * * * *
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> The question of the power of a legislature, when not restrained by a specific constitutional provision, to pass special laws, has been much mooted in the courts of this country; and it would subserve no useful purpose to go over the whole ground of controversy on this occa-

sion. Suffice it to say that laws of this character, for the purpose of healing defects, giving relief, aid, and authority in cases beyond the force of existing law, have been frequently passed in almost every State in the Union and have received the sanction not only of this court, but of other courts of high authority. The exercise of this power has been most conspicuous in that class of cases in which the legislature has been called upon to act as *parens patriæ* on behalf of lunatics, minors, and other incapacitated persons. Laws authorizing the sale of the estates of such persons have frequently been passed and have been upheld as fairly within the legislative power. The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But when it is not confided to the courts the power exercised is of a legislative character, the legislature making a law for the particular case. In some modern constitutions the exercise of this power has been prohibited by the legislative department. But where not so prohibited, and where it has never been authoritatively condemned in the jurisprudence of the State, we can not deny to the legislature the right to exercise it in those cases in which it has been accustomed to be exercised, amongst which we think the present case may be fairly reckoned. Such laws are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterwards be given.

Rice v. *Parkman* (16 Mass., 326) was a case where the property of certain minors had been sold under special act of the legislature authorizing the sale. The children after coming of age brought suit against the party claiming under the sale, insisting that the special statute was void. The supreme court of Massachusetts sustained the statute, and in the course of its opinion said:

> This is a power, frequently exercised by the legislature of this State since the adoption of the Constitution and by the legislatures of the province and of the colony while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament on similar subjects time out of mind. Indeed, it seems absolutely necessary for the interest of those who by the general rules of law are incapacitated from disposing of their property that a power should exist somewhere of converting lands into money; for otherwise many minors might suffer, although having property, it not being in condition to yield an income. This power must rest in the legislature in this Commonwealth, that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.
>
> It was undoubtedly wise to delegate this authority to other bodies, whose sessions are regular and constant and whose structure may enable them more easily to understand the merits of the particular application brought before them; but it does not follow that because

the power has been delegated by the legislature to courts of law it is judicial in its character.

This same question was also considered and decided by the supreme court of Mississippi in *Louisville, etc., Rwy. Co.* v. *Blythe* (30 American State Reports, 599). It was there said (p. 603):

> The doctrine is firmly established by the great weight of American decisions, and sustained by the most cogent and unanswerable reasoning, that special acts of the legislature authorizing or confirming the sale of lands by guardians are constitutional when their object is simply to provide a change of investment, and not to divest the beneficiary of property rights in the absence of special or exceptional constitutional limitations, and that such acts are not judicial, but the proper exercise of legislative power.
>
> Such a power necessarily resides in the legislative department of the Government, as *parens patriæ*, to prescribe such rules and regulations as may be proper for the management, superintendence, and disposition of the property of infants, lunatics, and persons who are incapable of managing their own affairs.

In *Henderson* v. *Dowd* (116 N. C., 195) it was said:

> This court is of the opinion that the legislature has the power to enact that the plaintiff be appointed guardian, * * * because there is no restriction on such power in the organic law. The policy is not for this court to consider. It is by the authority of the legislature that the duties of the clerk are prescribed and

> regulated, and if that body can delegate the execution of such duties to the clerk, it must have the power to do the same.

In *Davidson* v. *Johannot* (7 Metcalf, 388) it was said:

> The legislature has power to authorize the guardian of a person *non compos mentis* to sell a part of his ward's estate, and apply the proceeds to discharge incumbrances on other parts thereof.

In *Cochran* v. *Van Surlay* (20 Wend., 365) it was said:

> A private act of the legislature authorizing the sale of the estate of infants for their maintenance and education is within the scope of the legitimate authority of a State legislature. * * * It is clearly * * * within the powers of the legislature as *parens patriæ* to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs.

The character and extent of the prerogatives pertaining to the supreme power of a state as *parens patriæ* have been discussed by this court in various cases. In *Wheeler* v. *Smith* (9 How., 55, 77) it was said:

> When this country achieved its independence the prerogatives of the Crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal Government. The sovereign will is made known to us

> by legislative enactment. And to this we must look in our judicial action, instead of the prerogatives of the Crown. The State, as a sovereign, is the *parens patriæ*.

This statement is quoted substantially in *Fontain* v. *Ravenel* (17 How., 369, 384), and again in *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States* (136 U. S., 1, 57), where the court adds:

> This prerogative of *parens patriæ* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function and often necessary to be exercised in the interests of humanity and for the prevention of injury to those who can not protect themselves. Lord Chancellor Somers, in *Cary* v. *Bertie* (2 Vernon, 333, 342), said: "It is true infants are always favored. In this court there are several things which belong to the King as *pater patriæ*, and fall under the care and direction of this court, as charities, infants, idiots, lunatics, etc."
>
> The supreme judicial court of Massachusetts well said, in *Sohier* v. *Mass. Gen. Hospital* (3 Cush., 483, 497): "It is deemed indispensable that there should be a power in the legislature to authorize a sale of the estates of infants, idiots, insane persons, and persons not known or not in being who can not act for themselves.

> The best interest of these persons and justice to other persons often require that such sales should be made. It would be attended with incalculable mischiefs, injuries, and losses if estates in which persons are interested who have not capacity to act for themselves, or who can not be certainly ascertained, or are not in being, could under no circumstances be sold and perfect titles effected. But in such cases the legislature, as *parens patriæ*, can disentangle and unfetter the estates by authorizing a sale, taking precaution that the substantial rights of all parties are protected and secured."
>
> These remarks in reference to infants, insane persons, and persons not known, or not in being, apply to the beneficiaries of charities, who are often incapable of vindicating their rights, and justly look for protection to the sovereign authority, acting as *parens patriæ*. They show that this beneficent function has not ceased to exist under the change of government from a monarchy to a republic; but that it now resides in the legislative department, ready to be called into exercise whenever required for the purposes of justice and right, and is as clearly capable of being exercised in cases of charities as in any other cases whatever.

This quotation is peculiarly significant here because it is taken from a case where the court declares that sovereignty over the Territories is lodged in Congress.

The Cherokee Indians are clearly of that class of persons whose rights and interests must be protected and controlled by the sovereign authority under whose

jurisdiction they come, as *parens patriæ*. Not only are they living within the geographical limits of the United States, although not within the jurisdiction or subject to the control of any State, but under the control and jurisdiction of the General Government, whose sovereign will is made known by the enactments of the Congress, but they are also living within one of the Territories over which, and the people living therein, Congress has full power of legislation. It is clear that the prerogatives of *parens patriæ* as to these Indians are lodged in Congress. Here whatever claim the Indians have to the land is held by them not as individuals, but as a tribe, the wards of the nation, and it was clearly within the power of Congress to prescribe such measures as might be necessary to make the land yield an income for the benefit of the tribe and the individual members thereof. Each member of the tribe has the same interest in the tribal lands, the proceeds thereof, and the revenue derived therefrom as each other member, and it was not only the right, but the imperative duty of Congress as *parens patriæ* to so control said lands as to make them productive and insure to each member an equal benefit from the resulting income.

The individuals, especially the more ignorant among them, and the minors and orphans, were powerless to effectually assert and maintain their claims or to compel recognition of their right to equitable participation in the common property of the tribe. They could expect vindication of their rights and could look for protection

only from their sovereign authority as *parens patriæ*. If it be true, as said by this court, "that this beneficent function has not ceased to exist under the change of government from a monarchy to a republic, but that it now resides in the legislative department, ready to be called into exercise whenever required for the purposes of justice and right," this is a case where its exercise was most urgently called for. The conditions upon which this statement is predicated are set forth in the reports referred to and quoted from in *Stephens* v. *Cherokee Nation* (174 U. S., 445, 447–453). The Senate Committee on the Five Civilized Tribes of Indians, in the report of May 7, 1894 (Sen. Rep. No. 377, 53d Cong., 2d sess.), said, in part:

> As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the Government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the Government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.
>
> In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection and for the security of life, liberty, and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to

be no redress for the Indian so deprived of his rights, unless the Government does interfere to administer such trust.

The Dawes Commission, in the report of November 18, 1895, said:

> The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect.

Congress is not merely clothed with the power of protecting these Indian wards, but is *charged* with the *duty* of doing so. *Stephens* v. *Cherokee Nation* (174 U. S., 445, 488); *United States* v. *Kagama* (118 U. S., 375, 384). Nor is this duty one which can be surrendered or contracted away. In *Stone* v. *Mississippi* (101 U. S., 814, 820) it is said:

> But the power of governing is a trust committed by the people to the Government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power, but they can not give away nor sell the discretion of those that

> are to come after them in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances."

ACT OF MARCH 3, 1901, MAKING CHEROKEES CITIZENS, DOES NOT ALTER POWER OR DUTY OF CONGRESS.

The conferring of citizenship upon the members of the tribe has not changed the relationship of the tribe to the United States, nor does it make the lands other than tribal property. The duty and power of Congress over the tribe and its property are the same now as before the members were made citizens. The Cherokees still constitute an Indian tribe, a dependent community, the relationship to the Government still being that of a ward to the guardian. The principles and rules applicable to Indian tribes generally apply now as forcefully as ever to the Cherokees. The need for the exercise of the authority of Congress is as great now as before. The individual has no greater capacity or ability to secure participation in the common property of the tribe than he had in his former state.

The prerogatives of the Government as *parens patriæ*, which in this country are vested in the sovereign legislative organization, are usually called into activity in respect of citizens of the nation and their property. The fact that these Indians are citizens does not lessen the necessity for the intervention of Congress. To the duty of affording them protection as Indians is added the duty of protecting them as citizens within the exclusive jurisdiction of Congress. That the obligations of the Government toward the Indians are not terminated or discharged by making them citizens has come

to be a recognized rule of decision. Section 6 of the act of February 8, 1887 (24 Stat., 388), declares that Indians who shall take allotments in severalty under that act or any other act or treaty shall be citizens of the United States. The act of March 3, 1901 (31 Stat., 1447), extends that provision to "every Indian in Indian Territory." It is held that Indians who received allotments under the act of 1887, thereby becoming citizens, are not deprived of the care and control of Congress, that the status of citizenship is not incompatible with the status of a tribal Indian or the continued guardianship of the Government. *Eells et al.* v. *Ross* (64 Fed. Rep., 417, 420); *Beck* v. *Flournoy Live Stock, etc., Co.* (65 Fed. Rep., 30, 35); *United States* v. *Flournoy, etc., Co.* (69 Fed. Rep., 886, 891); *Farrell* v. *United States* (110 Fed. Rep., 942); *State* v. *Columbia George* (65 Pac. Rep., 604). In the last case it is said by the supreme court of Oregon (p. 610):

> It would seem, therefore, that citizenship, such as extends within the purview of the Dawes act [act February 8, 1887] to Indian allottees, is neither inconsistent nor incompatible with the status of a tribal Indian: that the Government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes, indulging them yet a little while, but with greater restricted authority, in their primitive government; and until the General Government has taken its hands off, and relinquished supervision over its Indians, the State court can not assume jurisdiction touching the criminal acts of one against another.

AN ACT OF CONGRESS MAY SUPERSEDE A TREATY.

It is earnestly contended by appellants that the granting of a lease for mining purposes upon any of the lands held by the Cherokee Nation would be a clear violation of the treaty provisions existing between the United States and the Cherokees. As said before, it is not alleged that the Secretary of the Interior proposes to do anything in the premises not authorized by the act of June 28, 1898, and the contention is, therefore, in effect that the provisions of that act relative to the leasing of mineral deposits are in conflict with the provisions of prior treaties.

It is respectfully submitted that there is no real conflict. The act does not contemplate the *taking* of any property of the Indians, but simply provides for the profitable administration of their property for their benefit. The United States did not in any treaty waive its right to control and administer the affairs of the Cherokees (*Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S., 655), but, on the other hand, this right was always asserted by the United States, and the ultimate sovereignty of the United States was always recognized by the Indians, and has been frequently invoked for their protection.

But if there be a conflict, the later act must prevail over the prior treaty. This principle has been frequently applied by this court to treaties with foreign nations, as in the *Head Money cases* (112 U. S., 580, 597–599); *Whitney* v. *Robertson* (124 U. S., 190, 194); *Botiller* v. *Dominguez* (130 U. S., 238–247); *The Chinese Exclusion case* (130 U. S., 581, 602); *Horner* v.

United States (143 U. S., 570, 578), and *Barker* v. *Harvey* (181 U. S., 481, 488), and also in many cases involving treaties with Indian tribes.

In *The Cherokee Tobacco* (11 Wall., 616, 620, 621) it was claimed that an act of Congress of July 20, 1868, declaring that the internal-revenue laws should be held to extend to the taxed articles produced anywhere within the exterior boundaries of the United States, did not have operation in the Cherokee Nation because in conflict with the provisions of the treaty of 1866. This court recognized the repugnancy, but held that the earlier treaty must yield to the later law. After citing the cases of *Foster* v. *Neilson* (2 Peters, 314), *Taylor* v. *Morton* (2 Curtis, 454), and *The Clinton Bridge* (1 Walworth, 155) as supporting the general proposition that a treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty, it was said:

> It need hardly be said that a treaty can not change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. In the cases referred to these principles were applied to treaties with foreign nations Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be

> involved and require their faithful observance, can not be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the Government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

In *Ward* v. *Race Horse* (163 U. S., 504, 511) it was found that the provisions of the act of Congress admitting Wyoming into the Union were in conflict with the provisions of a prior treaty assuring to the Bannock tribe of Indians the right to hunt upon the unoccupied lands of the United States, and it was held that the act of Congress, being later in date, repealed the provisions of the prior treaty in conflict therewith.

Thomas v. *Gay* (169 U. S., 264, 270–271) involved a question as to the right of the Territory of Oklahoma to collect taxes upon cattle grazed upon lands of the Osage and Kansas Indians. These lands were formerly a part of the Cherokee country, and it was claimed that the inclusion of them within the geographical limits of Oklahoma was in direct violation of treaty provisions. Speaking of this contention the court said:

> Whether, without express stipulation to that effect, the right granted by treaty to the Chero-

> kee Nation, to be exempt, as to their lands, from inclusion within the limits of any Territory or State, passed with the grant of a portion of such lands to the Osage and Kansas Indians, we need not consider, because, even if such were the law, it is conceded that the United States have, by the act of May 2, 1890, 26 Stat., 81, creating the Territory of Oklahoma, included these Osage and Kansas Indian lands within the geographical limits of said Territory.
>
> It is well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government.

In *Stephens* v. *Cherokee Nation* (174 U. S., 445) it was contended that this act of June 28, 1898, and other legislation affecting the Cherokee Indians in common with all the Five Civilized Tribes, was invalid, because in conflict with the provisions of prior treaties. In respect to that contention this court said (p. 483):

> The treaties referred to in argument were all made and ratified prior to March 3, 1871, but it is "well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government." (*Thomas* v. *Gay*, 169 U. S., 264, 271, and cases cited.)

That provision of the act of June 28, 1898, directing the survey and platting of town sites and the appraisal and sale of lots therein under the direction of the Secretary of the Interior was attacked before

the United States court of appeals for Indian Territory in the case of *Tuttle* v. *Moore* (64 Southwestern Reporter, 585). That court very pertinently said:

> It can not be said that the act is unconstitutional, because the Supreme Court of the United States has settled that question in the case of *Stephens* v. *Cherokee Nation*, when they affirmed the judgments in the citizenship cases by declaring, "We hold the entire legislation constitutional."

Because, however, the trial court had apparently held the opinion that Congress had no power to enact the legislation in question there without the consent of the Indians, the court of appeals gave special consideration to that branch of the controversy, and in an able opinion, showing on its face an exhaustive examination of the question and of authorities bearing on it, arrived at the conclusion that Congress had full power to enact the legislation, saying, in conclusion:

> It is too late for these tribal governments or their individual citizens to obstruct and render nugatory the legislation of Congress that has for its object the education and civilization of these Indians and the making of them good and worthy citizens of the United States and their country a rich and prosperous State of the Union. Neither the complaint of the plaintiff nor the petition of the Creek Nation stated a cause of action; neither has this court any jurisdiction of the questions here presented, and the demurrers of the appellants on these grounds should have been sustained.

The line of argument upon which that court reached that conclusion can not be successfully assailed. If Congress has the power to direct the sale of the lands of these Indians it has the power to direct the leasing of the mineral deposits therein for the benefit of the tribe. We respectfully submit that upon principle and under the authorities herein cited it must be held that the provisions of said act of June 28, 1898, relating to the leasing of minerals must prevail as if any provision of any prior treaty in conflict therewith "were not an element to be considered," and that the decisions below must be affirmed.

THE CHEROKEE LANDS ARE TRIBAL OR PUBLIC LANDS AND ARE NOT HELD IN INDIVIDUAL OR PRIVATE OWNERSHIP—THE COURTS HAVE NO JURISDICTION IN RESPECT OF THE POLITICAL FUNCTIONS OF THE GOVERNMENT.

The condition of affairs in the Indian Territory, as set forth in the reports referred to, and quoted from by this court in *Stephens* v. *Cherokee Nation* (*supra*), imperatively demanded that some action be taken to change that condition for the protection of the Indians themselves, and also for the protection of others who, upon the invitation of the various tribes, had invested capital in that country in various enterprises, among them being those for the development of the mineral resources. *Whatever title the Indians have is in the tribe, and not in the individuals*, although held by the tribe for the common use and equal benefit of all the members. (*The Cherokee Trust Funds*, 117 U. S., 288, 308.) The manner in which this land is held is described in *Cherokee Nation* v. *Journeycake* (155 U. S.,

196, 207), where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said:

> Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them.

In *Stephens* v. *Cherokee Nation* (174 U. S., 445, 488) it is said:

> The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership.

There was no provision by which the lands thus held were to be divided among the members, except in Article XX of the treaty of July 19, 1866 (14 Stat., 799), which reads as follows:

> Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them at the expense of the United States.

This provision of itself is a recognition of the ultimate sovereignty and control of the United States. While the legislative body of the tribe was permitted a large degree of control over the lands, yet the authority of Congress in the premises was never lost, nor was Congress relieved of the duty of seeing that said land, with the proceeds thereof and revenues derived therefrom, were held for the benefit of or equitably

apportioned to the members of the tribe. When the tribal authorities failed for any reason in the proper administration of the affairs of the tribe, whereby injustice was being done any member, or whereby the property of the tribe or the revenues therefrom were being wasted or perverted into wrong channels, it was the duty of Congress to resume the exercise of the power always residing in it of controlling said property and its use. This was all that was done by the provision of said act of 1898 regarding the leasing of mineral deposits. As shown by the authorities hereinbefore cited (see also appellee's brief in *Lone Wolf et al.* v. *Hitchcock et al.*, No. 275 of the present term), that action was purely political, over which the courts have no jurisdiction. It is not for them to say that the course adopted was not well advised or not calculated to secure the best results. The courts will not inquire as to the advisability of an act of the political branch of the Government acting within the scope of its jurisdiction any more than they will inquire into the motives of the legislature in enacting any specified law. The importance of preserving the division of powers under our system of government is recognized by all authorities upon the subject, and the fact that great evil would necessarily result from the usurpation by one branch of the powers intrusted to another is so plain that elaboration of the proposition is wholly unnecessary. This court, while rightly resisting any attempt upon the part of the legislative or executive branches of the Government to invade its territory, will with equal watchfulness avoid the assumption of control over any of the

functions belonging to either of those branches. We believe it has been clearly shown herein, under the authorities cited, that Congress has not exceeded the authority lodged in it, yet, even if there were doubt as to the validity of the legislation under consideration, that would not be sufficient to justify the courts in declaring it unconstitutional. The doubt must be resolved in favor of the legislative action. (Cooley's Constitutional Limitations, 6th ed., pp. 216–217, and authorities there cited.)

In *Fletcher* v. *Peck* (6 Cranch, 87, 128) Chief Justice Marshall said:

> The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court when impelled by duty to render such a judgment would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

The conclusion reached by Mr. Cooley is stated in the following words (p. 217):

> The constitutionality of a law, then, is to be presumed, because the legislature, which was

first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so. They are a coordinate department of the Government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may with some confidence repose upon their conclusion, as one based upon their best judgment.

Here, however, there is no occasion or room for presumption. The history of this legislation, as set forth by this court in *Stephens* v. *Cherokee Nation* (174 U. S., 445), shows that the whole matter was carefully investigated and considered by Congress, and that the act under consideration was passed, after due deliberation, with a full knowledge of existing conditions and the importance of the subject-matter, and with full conviction of their authority in the premises. This deliberate conclusion of a coordinate branch of the Government is entitled to and will receive great weight in any examination of the question by the courts.

In such cases the inquiry is limited to the question of power. In *McCulloch* v. *Maryland* (4 Wheaton, 316, 423), after finding that the law there under discussion provided an instrument necessary as a means

to effect legitimate objects of the Government, it was said:

> But were its necessity less apparent none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress in the execution of its powers adopt measures which are prohibited by the Constitution, or should Congress under the pretext of executing its powers pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power.

In *United States* v. *Des Moines Navigation and Railway Company* (142 U. S., 510, 544) the court quoted with approval a passage from Cooley's Constitutional Limitations as stating the correct rule. It was there said:

> * * * The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge and in good faith. It is true the bill alleges that its passage was induced by the

navigation company, by false representations and threats of suits; but such an allegation amounts to nothing. In Cooley's Constitutional Limitations (5th ed., 222) the author, citing several cases, observes: "From what examination has been given to this subject it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding. And, although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon."

In *Angle* v. *Chicago, St. Paul etc., Railway Co.* (151 U. S., 1, 18), the decision in *Fletcher* v. *Peck*, *supra*, was quoted from, and it was said:

> * * * The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the coordinate departments of the Government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly.

The rule is again laid down in *Lindsey and Phelps Co.* v. *Mullen* (176 U. S., 126, 146) and in a passage in *Luther* v. *Borden* (7 How., 1, 47), quoted in *Taylor and Marshall* v. *Beckham* (178 U. S., 548, 580), as follows:

> The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties and of the legislative and executive branches of the Federal Government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not

to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums.

The case presented here does not justify the conclusion that Congress has gone beyond its powers. If any injustice has been done by the legislation in question the remedy is not to be found in the courts, but by appeal to the political branch of the Government, which alone is responsible therefor, and which alone has the power to afford any needed relief.

THERE IS A DEFECT OF PARTIES DEFENDANT.

Even if the courts have any jurisdiction over this matter, the bill of complaint here is fatally defective because of the failure to make the Cherokee Oil and Gas Company a party defendant. The bill sets forth specifically that said company has made application for a lease or leases upon land of the Cherokee Nation for mining purposes (Record, p. 5), and it is especially prayed that the defendant be restrained "from proceeding further in the matter of granting the application of the said Cherokee Oil and Gas Company or any part thereof." (Record, p. 7.) This allegation and prayer are sufficient to demonstrate the necessity of making said company a party defendant to this proceeding. A decree in this suit awarding the writ of injunction as prayed might and presumably, from the statements made in the bill of complaint, would injuriously affect the interests of said company without any opportunity being given it to present its claims to the court for consideration. The defendant here has no

interest in this matter beyond that involved in his desire to faithfully administer the law. Upon the face of the bill of complaint said company has an interest which, whether it be large or small, it should be given an opportunity to defend before the court before any adverse action is taken in respect thereof.

By the second proviso to section 11 of the act of June 28, 1898, the rights of lessees or their assigns, who have, under the customs and laws prevailing in Indian Territory, acquired leases and have taken possession of lands and made improvements thereon for the development of oil, coal, asphalt, or other mineral deposits, are recognized and protected to the extent of according such lessees a preference in the making of new leases. The fact that the Cherokee Oil and Gas Company is asserting a claim to recognition under said law is sufficiently brought to the attention of the court by the allegations of the bill of complaint. The extent and character of that claim should be made known to the court before any action is taken which, as would be the result here if a decree be rendered in accordance with the prayer of the bill, adjudicates upon the merits of that claim. The claimant alone can properly present and support its interests, and it is therefore an indispensable party to these proceedings, while the respondent here is a party without real interest in the controversy.

This court in *California* v. *Southern Pacific Company* (157 U. S., 229, 249–251), discussed the question as to attributes which render persons indispensable parties to a suit, and adopted as a correct definition that

given in *Russell* v. *Clarke's Executors* (7 Cranch, 98), and quoted in *Shields* v. *Barrow* (17 How., 130), as follows:

> * * * 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. * * *

The general rule as laid down by a writer of high authority is also quoted with approval, as follows (p. 251):

> Mr. Daniel thus lays down the general rule: "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought, by service upon them of a copy of the bill or notice of the decree, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit." (1 Dan. Ch. Pl. and Pr., 4th Am. ed., 190.)

The position of the court as pictured there, and the question there asked and answered by the court in the

negative, accurately depict the conditions here, as is seen by the following quotation:

> Sitting as a court of equity, we can not, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties, or, at least, so far necessary that the cause should not go on in their absence. Can the court proceed to a decree as between the State and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?

In the light of the allegations in the bill here the court can not escape the consideration of the question whether the Cherokee Oil and Gas Company is not an indispensable party, and must answer in the negative the question whether the court can proceed to a decree in this suit "and do complete and final justice without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience."

In *New Orleans Water Works* v. *New Orleans* (164 U. S., 471) the complainant claimed, under an act of the general assembly of Louisiana, the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi River, and sought to have the court declare void certain ordinances

granting various parties the privilege of laying pipes in the city streets for the purpose of conveying water to their premises from the Mississippi. This court said (p. 480):

> * * * None of the parties for whose benefit the ordinances above referred to were passed were brought before the court or given an opportunity to be heard. Nevertheless, the plaintiff seeks a decree not only declaring those ordinances to be null and void, but requiring the city, within a named time, to recall, expunge, repeal, and cancel each ordinance that does not relate to premises contiguous to the Mississippi River, and if the city does not, within such time, and in some public way, cancel and annul those ordinances, then that the court, in this suit, shall adjudge and decree them to be null and void as illegally interfering with the rights of of the plaintiff.
>
> We do not suppose that any precedent can be found that would justify a court of equity in giving such relief. A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances, for, in the absence of the parties interested and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear, upon the very face of the record, not to be due process of law, and could be treated everywhere as a nullity. (*Windsor* v. *McVeigh*, 93 U. S., 274, 277; *Pennoyer* v. *Neff*, 95 U. S., 714, 733; *Scott* v. *McNeal*, 154 U. S., 34, 46.)

The question was also presented to and discussed by the United States circuit court of appeals in *Chadbourne's Executors* v. *Coe* (10 U. S. Appeals, 78, 83–84), where numerous authorities are cited.

BILL FALLS SHORT OF STATING CASE FOR EQUITABLE RELIEF BY INJUNCTION.

Even if the courts had jurisdiction over the subject-matter, there would be no good grounds for granting the prayer of the bill of complaint. No injury has been done the Cherokee Nation, and none will result from the action which the complaint alleges is contemplated. The bill does not allege any specific injury, the allegations in respect to injury to be suffered being couched in general, vague, and indefinite terms. As a matter of fact, the provisions of said act of June 28, 1898, as to the leasing of mineral deposits are along the same general lines as those of the Cherokee laws, differing therefrom only in better safeguarding the interests of all parties entitled to be protected. An act of the Cherokee national council of December 6, 1890 (see Article XIX, Compiled Laws of the Cherokee Nation, 1892), declared all minerals discovered in the Cherokee country to be the property of the Cherokee Nation and subject to the control of the national council. It provided that every person, company, or corporation proposing to engage in mining should procure a license from the treasurer of the nation describing the location selected, with a proviso that no lease should exceed 5 miles square; that any citizen having such a license might with the approval of

the national treasurer sublet such lease to any person, company, or corporation whatever; that no license should be granted for a longer period than twenty years, but that any lessee might renew his lease by complying with the laws of the nation; that a sublessee should be subject to all the liabilities and entitled to all the privileges granted to the original lessee; that persons then holding leases might have the same extended for a period of twenty years from the approval of said act by making application to the national treasurer and having his indorsement on the lease to that effect, and fixed the rate of royalty to be paid into the national treasury on the various substances to be mined. It is seen by comparison that the changes made by the act of 1898 are all calculated to better safeguard the interests of the nation, while at the same time affording due protection to those who may have acquired rights under the Cherokee law. In this view of it the act in question contains nothing which can with reason be said to afford any good ground of complaint upon the part of the Cherokee Nation.

Furthermore, the statements of the bill as to the necessity for relief by way of injunction to prevent the multiplicity of suits and irreparable injury to complainants are not sufficient. In *Cruickshank* v. *Bidwell* (176 U. S., 73, 80, 81) this court said:

> It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of

> the law, or that the case falls under some recognized head of equity jurisdiction. *Shelton* v. *Platt*, 139 U. S., 591; *Allen* v. *Pullman's Palace Car Company*, 139 U. S., 658; *Pacific Express Company* v. *Seibert*, 142 U. S., 339; *Pittsburg, etc., Railway Company* v. *Board of Public Works*, 172 U. S., 32; *Arkansas Building and Loan Association* v. *Madden*, 175 U. S., 269. * * *
>
> Inadequacy of remedy at law exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits or the prevention of irreparable injury. The one head is well illustrated by *Union Pacific Railway Company* v. *Cheyenne* (113 U. S., 516), and *Smyth* v. *Ames* (169 U. S., 466, 517), and the other by *Watson* v. *Sutherland* (5 Wall., 74); cited by counsel.
>
> But this bill does not aver, nor does it appear, that there would be any multiplicity of suits if complainants were left to their remedy at law.
>
> The sole ground of equity jurisdiction put forward is the inadequacy of remedy at law in that the injury threatened is not susceptible of complete compensation in damages. The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result, and in this particular we think the bill fatally defective.

The rule thus laid down that "the mere assertion that the apprehended acts will inflict irreparable injury is not enough" applies with equal aptitude and force to assertions in respect of multiplicity of suits. It is respectfully submitted that the bill of complaint here

does not present facts from which the court may reasonably infer that a refusal to award the writ of injunction would result either in a multiplicity of suits or in irreparable injury to the complainants.

It is asserted that numerous applications have been made to respondent for mining leases upon lands belonging to said nation, but it is not asserted in respect of any such applications, except that of the Cherokee Oil and Gas Company, that it embraces lands in possession of citizens of said nation, or upon which they have made improvements, nor is it alleged that the respondent is giving favorable consideration to or is about to grant any application except that of the Cherokee Oil and Gas Company, or that he is about to execute any such lease for any lands except those included in the application of said company. As to all such alleged applications the statements of the bill are clearly too indefinite to support the claim for relief, and hence they may be eliminated from the discussion. It is asserted that the Cherokee Oil and Gas Company's application is for a lease or leases upon about ninety-four thousand acres, and that numerous citizens are in possession of the lands embraced in said application. This is followed by the statement that the respondent is giving favorable consideration to said application to the extent of a lease or leases upon 18 sections of land, or about 11,520 acres. The court is not informed what number of citizens are upon those lands, nor is there, in fact, a specific allegation that any citizen is thereon. The only

inference to be legitimately drawn from these statements of the bill is that there are only two parties—the Cherokee Nation and the Cherokee Oil and Gas Company—interested in this matter. The facts alleged are not such as justify the inference that a multiplicity of suits may be avoided only by resort to the writ of injunction.

The allegations as to irreparable injury are equally general and insufficient. It is not demonstrated by the facts alleged that any individual citizen of said nation has any interest in any specific tract of land to be covered by the proposed lease that would be injuriously affected by granting such lease. It is asserted, apparently in support of the proposition that the granting of the proposed lease would result in irreparable injury and loss to the citizens of said nation, that the lands of the Cherokees will in the near future be allotted to the citizens of the nation, each of whom will be entitled to his proportionate share thereof. The act of June 28, 1898, contains a provision as follows:

> Where any oil, coal, asphalt, or other mineral is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other land and improvements shall be ascertained under the direction of the Secretary of the Interior and paid to the allottee or owner of the land, by the lessee or party operating the same, before operations begin.

If any individual claim be injuriously affected by any lease, this provision affords a certain and adequate remedy. That act also contains (sec. 11) a provision for allotments. The scheme there provided, however, restricts the allotments to the surface of the lands and specifically excepts therefrom all oil, coal, asphalt, and mineral deposits, they being reserved to the tribe. No individual could acquire any interest under that scheme of allotment that would be injured by a lease of the mineral deposits, except such as are fully protected by the provision, *supra*, for compensation. We respectfully submit that the bill does not present facts which justify the intervention of the courts by means of the writ of injunction.

IN CONCLUSION.

It is urged in behalf of the appellee that the decisions below should be sustained because the act of June 28, 1898, is a valid exercise of the power vested in Congress, and fully authorizes the respondent to do and perform the things which the complainants seek to have him enjoined from doing; because an indispensable party has not been brought into court; because the allegations of the bill of complaint are general and indefinite and do not present facts which entitle the complainants to the relief prayed for or to any relief; and because the things complained of are matters of administration within the jurisdiction of the political

department of the Government and not the subject of judicial cognizance.

Respectfully submitted.

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